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EIGHTH AMENDMENT—CAPITAL SENTENCING INSTRUCTIONS

Johnson v. Texas, 113 S. Ct. 2658 (1993)

I. INTRODUCTION

In *Johnson v. Texas*,¹ the United States Supreme Court held that the Texas capital sentencing statute did not violate the Eighth Amendment rights of petitioner Dorsie Lee Johnson, Jr.² The Court ruled that the trial court was not constitutionally required to instruct the jury to consider mitigating aspects of Johnson's youth independent of the statute's special issue framework.³ According to the Court, the jury was able to adequately consider all of the mitigating evidence proffered by Johnson, including evidence of his youth, through an assessment of Johnson's future dangerousness.⁴

This Note argues that the Court, by failing to recognize the importance of Johnson's moral culpability as a factor in sentencing, incorrectly held that the Texas capital sentencing statute was constitutional as applied to Johnson. Consistent with Justice O'Connor's dissenting opinion, this Note asserts that the Eighth Amendment requires the level of punishment for a crime to be directly proportional to a defendant's moral culpability. Because the Texas sentencing statute precluded the jury from giving "independent mitigating weight" to Johnson's youth, this Note argues that the statute failed to meet the constitutional requirement of proportional punishment. In addition, this Note argues that under the Eighth Amendment, the jury must be able to consider fully all of a defendant's proffered mitigating evidence as it relates to his moral culpability.

II. BACKGROUND

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed,

¹ 113 S. Ct. 2658 (1993).

² *Id.* at 2672.

³ *Id.* at 2670; see *infra* note 21 and accompanying text for an explanation of the special issue framework.

⁴ *Johnson*, 113 S. Ct. at 2670.

nor cruel and unusual punishments inflicted.”⁵ The Court’s first significant interpretation of the Eighth Amendment’s role in capital sentencing procedure appeared in *Furman v. Georgia*.⁶ In *Furman*, the Court held that a system which allowed unconstrained jury discretion at the sentencing phase of a capital trial violated the Eighth Amendment’s prohibition against “cruel and unusual punishment.”⁷ To protect against the risk of arbitrary and capricious death penalty sentences, the Court concluded that the Eighth Amendment requires states to channel the discretion of sentencing juries through appropriate statutory schemes.⁸

In response to *Furman*, some states adopted mandatory statutory sentencing schemes to reduce the risk of arbitrary and capricious decision making.⁹ Although mandatory sentencing produced uniformity in the capital sentencing process, systems that prevented the sentencer from considering the character of the defendant and the nature of his crime remained unjust. In two 1976 cases, the Court recognized that the “fundamental respect for humanity underlying the Eighth Amendment” required sentencing statutes to follow another principle that conflicted with the principle stated in *Furman*.¹⁰ The Court stated that “consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death.”¹¹ Since the mandatory sentencing statutes in question did not allow for the consideration of mitigating evidence, the Court determined that both statutes constituted “cruel and unusual punishment” within the scope of the Eighth Amendment.¹²

In 1978, the Supreme Court again confronted the conflict between the Eighth Amendment’s requirement of uniformity in a capi-

⁵ U.S. CONST. amend. VIII.

⁶ 408 U.S. 238 (1972).

⁷ *Id.* at 308-10 (Stewart, J., concurring). While no two Justices agreed on the exact same rationale in *Furman*, the guiding principle of the Court’s decision is best expressed in Justice Stewart’s concurring opinion. *Johnson*, 113 S. Ct. at 2664.

⁸ *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

⁹ The mandatory sentencing statutes listed all of the offenses that constituted first degree murder and imposed an automatic death sentence on any defendant convicted of one of the enumerated offenses. *See, e.g.*, N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975) (amended 1977, 1979, 1981, 1987, 1989); LA. REV. STAT. ANN. § 14:30 (West 1974) (amended 1976, 1979, 1985, 1987, 1988, 1989, 1992).

¹⁰ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion); *see also* *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion).

¹¹ *Woodson*, 428 U.S. at 304 (controlling joint opinion of Stewart, Powell, and Stevens, JJ.); *see also* *Roberts*, 428 U.S. at 333 (controlling joint opinion of Stewart, Powell, and Stevens, JJ.).

¹² *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 335-36.

tal sentencing scheme and the need for a sentencer to consider the individual nature of a defendant and his crime. In *Lockett v. Ohio*,¹³ the defendant claimed "that her death sentence [was] invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime."¹⁴ In response to Lockett's contention, the Court acknowledged that the cases following *Furman* had not provided states with clear and adequate guidelines for constructing capital sentencing statutes.¹⁵ The Court refined the Eighth Amendment's requirements in an attempt to eliminate the apparent tension between the principle that states must channel jury discretion and the notion that a sentencer must consider both the particularized characteristics of the defendant and the particularized nature of the crime.¹⁶

Given the severity of the choice between life and death, the Court concluded that "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."¹⁷ To ensure that a defendant is not denied this "degree of respect," the Court placed a great deal of weight on the sentencer's ability to consider the individualized nature of the defendant:

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.¹⁸

¹³ 438 U.S. 586 (1978).

¹⁴ *Id.* at 597. The Ohio sentencing statute under attack required a two-tiered inquiry similar, although not identical, to the Texas statute. First, the statute specified seven aggravating circumstances of murder, at least one of which must be present in order for an offense to fall within the scope of capital punishment. OHIO REV. CODE ANN. § 2929.04(A) (Baldwin 1975) (amended 1981). Once a defendant was convicted of a capital offense, the "Ohio death penalty statute required the trial judge to impose a death sentence unless, after 'considering the nature and circumstances of the offense' and [the] 'history, character, and condition' " of the offender, the sentencing judge determined that the defendant had established at least one of three stated mitigating circumstances by a preponderance of the evidence. *Lockett*, 438 U.S. at 593-94 (quoting OHIO REV. CODE ANN. § 2929.04(B) (Baldwin 1975) (amended 1981)).

¹⁵ *Id.* at 602.

¹⁶ The Court established the first principle in *Furman v. Georgia*, 408 U.S. 238 (1972), and the second principle in *Woodson*, 428 U.S. at 280.

¹⁷ *Lockett*, 438 U.S. at 605.

¹⁸ *Id.* at 604. As part of this requirement, states now must allow the sentencer to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Id.* at 605.

Since the sentencing statute created the risk that the death penalty would be imposed despite mitigating factors that may have called for a less severe sentence, the Ohio statute was incompatible with the Eighth Amendment.¹⁹

Responding to the Supreme Court's evolving capital punishment jurisprudence, Texas adopted a unique capital sentencing scheme. The scheme contained two basic components. First, the scheme limited the application of capital punishment to intentional and knowing murders committed in six situations.²⁰ Second, the statute instructed the sentencer to answer three special issues to determine whether the defendant should be sentenced to death.²¹ If the sentencer answered the special issues in the affirmative, then the

¹⁹ *Id.* at 605. In a series of cases, the Court has reaffirmed *Lockett's* interpretation of the Eighth Amendment. See *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."); see also *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (trial judge unconstitutionally instructed the jury not to consider evidence of the defendant's family background and capacity for rehabilitation); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (trial court unconstitutionally prevented a defendant from presenting evidence to the sentencer concerning the defendant's positive adjustment to prison life).

²⁰ The six situations are as follows:

- (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
- (2) the person intentionally commits murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson;
- (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
- (4) the person commits the murder while escaping or attempting to escape from a penal institution;
- (5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution; or
- (6) the person murders more than one person:
 - (A) during the same criminal transaction; or
 - (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

TEX. PENAL CODE ANN. § 19.03 (West 1989 & Supp. 1994) (amended 1993).

²¹ The portion of the Texas sentencing statute that establishes the special issues inquiry states:

- (b) On conclusion of the presentation of the evidence [at the sentencing phase of a capital murder trial], the court shall submit the following issues to the jury:
 - (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
 - (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
 - (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CRIM. PROC. CODE ANN. § 37.071 (West 1981).

court had no choice but to impose the death penalty.²²

The Supreme Court first considered the constitutionality of this Texas capital sentencing statute in *Jurek v. Texas*.²³ In *Jurek*, the defendant was convicted for the murder of a ten-year-old girl committed during the course of a kidnapping and attempted rape.²⁴ Since the offense was one of the specified capital crimes listed in Texas' sentencing statute, the trial court instructed the jury to determine the defendant's punishment based solely on the answers to the two relevant special issues.²⁵ A unanimous jury answered both questions in the affirmative and, accordingly, the judge sentenced the defendant to death.²⁶

The defendant appealed all the way to the Supreme Court, arguing that the post-*Furman* changes in Texas' sentencing statute were "no more than cosmetic in nature and ha[d] in fact not eliminated the arbitrariness and caprice of the system held in *Furman* to violate the Eighth and Fourteenth Amendments."²⁷ Analyzing the statute in light of the competing principles expressed in *Furman* and the mandatory sentencing cases,²⁸ the Court reasoned that the "constitutionality of the Texas procedures turns on whether the enumerated questions [special issues] allow consideration of particularized mitigating factors."²⁹ The Court examined the Texas Court of Criminal Appeals' interpretation of the second special issue to resolve this essential question.³⁰ The Texas Court of Criminal Appeals had "indicated that it will interpret the second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show."³¹ Based on this

²² The relevant portion of the Texas sentencing statute stated:

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

TEX. CRIM. PROC. CODE ANN. § 37.071 (West 1981) (amended 1981, 1991).

²³ 428 U.S. 262 (1976).

²⁴ *Id.* at 264-67.

²⁵ Based on the facts of the case, the trial court concluded that the third special issue was not relevant to the sentencing decision. *Id.* at 267.

²⁶ *Id.* at 268.

²⁷ *Id.* at 274.

²⁸ *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

²⁹ *Jurek*, 428 U.S. at 272.

³⁰ *Id.*

³¹ *Id.* For *Jurek*'s particular sentencing process, the Texas Court of Criminal Appeals stated:

In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. . . . It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. . . .

broad interpretation of the second issue, the Supreme Court concluded that "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."³² As a result, the Texas sentencing statute did not violate the requirements of the Eighth Amendment.³³

Although *Jurek* resolved the question of the facial constitutionality of Texas' capital sentencing statute, the principles expressed in *Lockett v. Ohio*³⁴ two years later prompted several new challenges to the Texas death penalty system.³⁵ The new challenges did not contest the general constitutionality of the Texas statute; rather, they focused on a sentencer's ability to fully consider particular types of mitigating evidence under the special issues format.

In *Franklin v. Lynaugh*,³⁶ a convicted defendant claimed that the special issue instructions required by the Texas statute "did not allow the jury to give adequate weight to the mitigating evidence of [his] good behavior while in prison."³⁷ The defendant argued that the mitigating evidence he presented to the jury had significance, as a reflection on his character, independent of its relevance to the special issues.³⁸ Rejecting the defendant's assertion, the Court concluded that "the jury was surely free to weigh and evaluate petitioner's disciplinary record as it bore on his 'character' . . . as measured by his likely future behavior."³⁹ Since the jury was able to

Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975).

³² *Jurek*, 428 U.S. at 273-74.

³³ *Id.* at 276.

³⁴ 438 U.S. 586 (1978).

³⁵ The *Lockett* Court distinguished its decision in *Jurek* by noting that the Texas Court of Criminal Appeals had broadly interpreted the second special issue in the Texas sentencing statute. *Id.* at 607. Unlike the Ohio statute, which limited the number of mitigating factors the sentencer could consider, the broad scope of Texas' second special issue did not "prevent the sentencer [in *Jurek*] from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." *Id.* Thus, although the structure of the Ohio and Texas capital sentencing statutes was similar, the Court's refined Eighth Amendment interpretation in *Lockett* did not affect the facial constitutionality of the Texas statute.

³⁶ 487 U.S. 164 (1988).

³⁷ *Id.* at 172. At trial, the defendant submitted five special jury instructions requesting the jury to consider all the defendant's proffered mitigating evidence when answering the special issues. The instructions essentially stated that mitigating evidence "could alone be enough to return a negative answer to . . . [the issues]—even if the jury otherwise believed that 'Yes' answers to the [s]pecial [i]ssues were warranted." *Id.* at 169. The trial judge refused to deliver any of the defendant's requested jury instructions. *Id.* at 169-70.

³⁸ *Id.* at 177.

³⁹ *Id.* at 178.

weigh the mitigating evidence in relation to the second special issue, there was no constitutional requirement that the jury should have been able "to cast an 'independent' vote against the death penalty" apart from its answers to the special issues.⁴⁰

By reaffirming the constitutionality of Texas' death penalty statute, the Court indicated that *Lockett's* emphasis on mitigating evidence did not suggest that *Jurek* should be overruled or modified. The Court stated that "we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty."⁴¹ Because the Texas special issue format channeled jury discretion in a way that did not preclude the jury from considering relevant mitigating evidence, the Court was not inclined to overrule *Jurek*.⁴²

In her concurring opinion in *Franklin*, however, Justice O'Connor expressed some doubts about the constraints that the Texas system imposed on a jury's consideration of mitigating evidence. In Justice O'Connor's view, the punishment in a capital case "should be directly related to the personal culpability of the criminal defendant."⁴³ As long as the mitigating evidence introduced by a defendant is only relevant to the special issues, the jury should be able to decide the appropriate punishment.⁴⁴ However, to the extent the mitigating evidence "had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence."⁴⁵ Although Justice O'Connor concluded that the facts of *Franklin* did not present such a situation, her opinion paved the way for future attacks on the Texas special issues based on a sentencer's inability to consider the effect of mitigating evidence on moral culpability.

A year later, in *Penry v. Lynaugh*,⁴⁶ a defendant claimed that the Texas death penalty statute did not allow the jury to consider and give mitigating effect to evidence of his mental retardation. Delivering the opinion of the Court, Justice O'Connor stated that the Texas statute violated the defendant's Eighth Amendment rights because

⁴⁰ *Id.* at 179.

⁴¹ *Id.* at 181.

⁴² *Id.* at 180.

⁴³ *Id.* at 184.

⁴⁴ *Id.* at 185.

⁴⁵ *Id.*

⁴⁶ 492 U.S. 302 (1989).

it did not allow the jury to express a "reasoned moral response" to the evidence of mental retardation in rendering its sentencing decision.⁴⁷

In respect to the statute's first special issue,⁴⁸ Justice O'Connor concluded that, while the jury was able to consider the evidence in determining whether the defendant had acted "deliberately," it was unable to consider *fully* the evidence because the defendant's mental retardation "had relevance to [his] moral culpability beyond the scope of the special verdict question."⁴⁹ Clearly, a rational juror could have determined that the defendant had acted deliberately, while at the same time recognizing that he was less morally culpable than defendants who were not mentally retarded.⁵⁰

Like the first special issue, the special issue regarding "future dangerousness" did not allow the jury to consider fully the mitigating effect of the defendant's mental retardation.⁵¹ Justice O'Connor described the evidence the defendant introduced at trial as a "two-edged sword."⁵² While the defendant's mental retardation substantially impaired his ability to learn from past mistakes, it also reduced his moral culpability for the crime committed.⁵³ Within the confines of the special issues, the jury had no choice but to consider the defendant's mental retardation solely as an aggravating factor in its "future dangerousness" inquiry.⁵⁴ As a result, the jury was not able to reduce the sentence in accordance with the defendant's diminished moral blameworthiness.⁵⁵

While the Court stopped short of overruling *Jurek*, *Penry* represented a break from prior cases upholding the constitutionality of the Texas capital sentencing statute. Justice O'Connor's doubts about the Texas system, first expressed in *Franklin*, were a driving force behind the Court's re-evaluation of the special issue jury instruction format.

Recently, in *Graham v. Collins*,⁵⁶ the Court encountered another Eighth Amendment challenge to the Texas special issue jury instructions. Relying on *Penry*, the defendant argued that the jury was not able to give full effect to mitigating evidence of his youth, family

⁴⁷ *Id.* at 328.

⁴⁸ See *supra* note 21.

⁴⁹ *Penry*, 492 U.S. at 322.

⁵⁰ *Id.* at 322-23.

⁵¹ *Id.* at 324.

⁵² *Id.*

⁵³ *Id.* at 323-24.

⁵⁴ *Id.* at 323.

⁵⁵ *Id.* at 327-28.

⁵⁶ 113 S. Ct. 892 (1993).

background, and positive character traits.⁵⁷ The Court ruled, however, that *Penry* could not be extended to the facts in *Graham*.⁵⁸ Unlike the aggravating nature of the mental retardation evidence in *Penry*, the evidence of Graham's youth "had mitigating relevance to the second special issue concerning his likely future dangerousness."⁵⁹

Although the Court applied the analysis in *Penry* to Graham's claim, the Court based its holding against Graham on other grounds.⁶⁰ Because Graham brought the case before the Court on collateral review, the Court had to determine initially whether granting Graham relief would create a new rule of constitutional law under *Teague v. Lane*.⁶¹ To resolve this threshold issue, the Court implemented a standard that required it to rule against Graham "unless reasonable jurists hearing petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in [his] favor."⁶² Since "reasonable jurists may [have] disagree[d]" about whether precedent dictated Graham's requested relief, the Court concluded that Graham was asking for a new constitutional rule.⁶³ By dismissing Graham's claim under *Teague*, the Court did not deal directly with whether "*Penry* reasonably could be read to suggest that Graham's mitigating evidence was not adequately considered under the former Texas procedures."⁶⁴

Recognizing the inadequacies of the Texas capital sentencing statute, as pointed out in *Penry*, the Texas legislature amended the statute in 1991.⁶⁵ The amendment explicitly required courts to instruct the sentencing jury to consider all of a defendant's mitigating evidence, not only as it relates to the special issues, but also as it pertains to the defendant's moral culpability.⁶⁶ Although the

⁵⁷ *Id.* at 895.

⁵⁸ *Id.* at 902.

⁵⁹ *Id.*

⁶⁰ *Id.* at 902-03.

⁶¹ 489 U.S. 288 (1989). In *Teague*, the Court established that new constitutional rules will not be applied retroactively to invalidate final state convictions on federal habeas review. *Id.* at 310. When hearing disputes on collateral review, all courts must first resolve the threshold issue of whether the court's holding would constitute a new rule under *Teague*. *Id.* at 301.

⁶² *Graham*, 113 S. Ct. at 898 (quoting *Saffle v. Parks*, 494 U.S. 484 (1990)).

⁶³ *Id.* at 902.

⁶⁴ *Id.* at 902-03.

⁶⁵ TEX. CRIM. PROC. CODE ANN. § 37.071(2)(e) (West Supp. 1994).

⁶⁶ The amended version of the statute adds the following provision:

The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article [special issues], it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circum-

amendment provides a more appropriate punishment procedure for defendants convicted of offenses committed on or after September 1, 1991, individuals who committed offenses prior to that date, such as Dorsie Lee Johnson, Jr., must continue to challenge the constitutionality of the former statute.⁶⁷

III. FACTS AND PROCEDURAL HISTORY

Late in the evening on March 23, 1986, petitioner Dorsie Lee Johnson, Jr., and a female companion developed a plan to commit an armed robbery of a convenience store in Snyder, Texas.⁶⁸ As part of their plan, Johnson, age nineteen, and his companion agreed that there should be no witnesses to the proposed robbery.⁶⁹ After an initial surveillance of the store, Johnson, carrying a handgun in his pocket, entered the store with his companion to execute the robbery.⁷⁰

Shortly after entering the convenience store, Johnson instructed the only clerk on duty to lie down on the floor while his companion emptied the cash register of about \$160.00.⁷¹ Although the clerk passively complied with Johnson's order, Johnson fired a fatal bullet directly into the back of the clerk's neck. Having eliminated the only witness to the robbery, Johnson and his companion rushed out of the store and left the crime scene undetected.⁷²

A few weeks later, Johnson attempted a similar armed robbery in Colorado City, Texas.⁷³ This attempt proved unsuccessful, and Johnson was arrested for the robbery and attempted murder of the Colorado City store clerk. Following his arrest, Johnson voluntarily confessed to the murder and robbery in Snyder.⁷⁴ As a result of Johnson's confession, a Texas trial court convicted him of capital murder.⁷⁵

Consistent with Texas law, an independent sentencing hearing

stances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

TEX. CRIM. PROC. CODE ANN. § 37.071(2)(e) (West Supp. 1994).

⁶⁷ TEX. CRIM. PROC. CODE ANN. § 37.071(2)(e) (West Supp. 1994) (effective Sept. 1, 1991).

⁶⁸ Johnson v. Texas, 113 S. Ct. 2658, 2661 (1993).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

followed Johnson's conviction.⁷⁶ At the beginning of the sentencing stage, the court instructed the jury to answer two special issues as stated in the Texas capital sentencing statute.⁷⁷ The court told the jury that the answers to these special issues would determine whether Johnson would be put to death for his crimes.⁷⁸ For the first issue, the jury had to decide whether "the conduct of the [d]efendant . . . that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result."⁷⁹ Following this determination, the jury had to determine whether there was a "probability that the [d]efendant . . . would commit criminal acts of violence that would constitute a continuing threat to society."⁸⁰ In determining both of these special issues, the court instructed the jury to consider "all the evidence submitted . . . in the trial of this case, whether aggravating or mitigating in nature."⁸¹

While the prosecution presented numerous witnesses in an attempt to convince the jury to answer the special issues in the affirmative,⁸² Johnson's attorney presented only one witness—Johnson's father.⁸³ Johnson's father explained to the jury that his son's criminal activities were primarily the result of drug use and youth.⁸⁴ In regard to the effects of youth, he stated:

[A]ll I can say is I still think that a kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not—I don't say what is right or wrong, but the evaluation of it, how much, you know, that might be—well, he just don't—he just don't evaluate what is worth—what's worth and what's isn't like he should like a thirty or thirty-five year old man would. He would take under consideration a lot of things that a younger person that age wouldn't.⁸⁵

⁷⁶ *Id.* at 2662.

⁷⁷ *Id.* While there are three special issues under the former Texas statute, the third special issue was not relevant to Johnson's case because his criminal acts were unprovoked. See *supra* note 21.

⁷⁸ *Johnson*, 113 S. Ct. at 2662.

⁷⁹ *Id.* (citing TEX. CRIM. PROC. CODE ANN. § 37.071(b)(1) (West 1981)).

⁸⁰ *Id.* (citing § 37.071(b)(2)).

⁸¹ *Id.*

⁸² The State used the testimony of the witnesses to establish Johnson's violent tendencies. One witness testified that Johnson had shot the Colorado City store clerk in the face, causing permanent brain damage and disfigurement. *Id.* Another witness stated that Johnson had fired two bullets at a man in Snyder, Texas, six days after murdering the Snyder store clerk. *Id.* In addition to the testimony concerning Johnson's teen-age actions, the State also called witnesses to testify about Johnson's deviant behavior during his younger years. For example, one witness testified that Johnson had cut him with a piece of glass while in seventh grade. *Id.*

⁸³ *Id.* at 2663.

⁸⁴ *Id.*

⁸⁵ *Id.*

After considering all of the evidence, a unanimous jury returned affirmative answers to both special issues.⁸⁶ Based on the jury's findings, the court sentenced Johnson to death by lethal injection.⁸⁷

Rejecting all seven of Johnson's alleged errors,⁸⁸ none of which involved a challenge to the court's sentencing instructions, the Texas Court of Criminal Appeals affirmed Johnson's conviction and death sentence.⁸⁹ Five days later, the Supreme Court decided *Penry v. Lynaugh*.⁹⁰ In response to *Penry*, Johnson filed a motion for rehearing in the Texas Court of Criminal Appeals, alleging that the special issues required by the Texas capital sentencing statute violated his Eighth Amendment rights because they did not allow for sufficient consideration of the mitigating factor of youth.⁹¹ Once again, the court rejected Johnson's argument, finding that "the jury was able to express a reasoned moral response to [Johnson's] mitigating evidence within the scope of the . . . instructions given to them by the trial court."⁹²

Johnson continued to challenge the constitutionality of his death sentence by filing a petition for certiorari with the United States Supreme Court.⁹³ The Court granted Johnson's petition⁹⁴ to decide the question of whether the Texas special issues allowed the jury to adequately consider the mitigating effect of Johnson's youth.⁹⁵

⁸⁶ *Id.* at 2664.

⁸⁷ Respondent's Brief at 3, *Johnson* (No. 92-5653).

⁸⁸ Five of the alleged errors involved the trial court's rulings on challenges for cause of venirepersons made by Johnson and the State. As a sixth error, Johnson alleged that the trial court sua sponte excused a veniremember over his objections and without a challenge for cause by either party. For the seventh error, Johnson claimed that the trial court erred in failing to grant his motion for a change of venue. *Johnson v. Texas*, 773 S.W.2d 322 (Tex. Crim. App. 1989).

⁸⁹ *Johnson*, 113 S. Ct. at 2664.

⁹⁰ 492 U.S. 302 (1989). See *supra* notes 46-55 and accompanying text for a discussion of *Penry*.

⁹¹ *Johnson*, 113 S. Ct. at 2664.

⁹² *Id.* Johnson argued that the trial judge should have given an instruction to the jury explicitly allowing the jury to consider his age as a mitigating factor. *Id.* Although Johnson had neither requested such an instruction at trial nor argued the issue prior to the rehearing stage on appeal, his claim was not procedurally barred. *Id.* Thus, the court decided Johnson's claim on its merits.

⁹³ *Id.*

⁹⁴ *Johnson v. Texas*, 113 S. Ct. 1148 (1993).

⁹⁵ *Johnson*, 113 S. Ct. at 2661.

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,⁹⁶ Justice Kennedy concluded that the Texas special issue format did not violate the Eighth Amendment rights of Dorsie Lee Johnson, Jr.⁹⁷ Justice Kennedy found no support in *Furman* and its progeny for Johnson's contention that the sentencing statute unconstitutionally limited the jury's consideration of the mitigating evidence of his youth. Thus, according to Justice Kennedy, the trial court was not constitutionally required to give a separate jury instruction that would have allowed the jury to consider Johnson's age as a mitigating factor independent of the special issues.⁹⁸

To assess whether the Texas capital sentencing jury instructions satisfied the requirements of the Eighth Amendment, the majority considered "whether there [was] a reasonable likelihood that the jury [had] applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence."⁹⁹ Justice Kennedy recognized that Johnson's youth was a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury.¹⁰⁰ He believed, however, that "there [was] no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of [Johnson's] youth."¹⁰¹ Because the relevance of youth as a mitigating factor stems from youth's transient nature, the jury was able adequately to take youth into account as a mitigating factor through its assessment of Johnson's future dangerousness.¹⁰²

Contrary to Johnson's assertion, the majority did not believe that *Penry v. Lynaugh*¹⁰³ demanded a reversal of Johnson's death sentence.¹⁰⁴ The majority distinguished *Penry* from Johnson's situation

⁹⁶ Chief Justice Rehnquist and Justices White, Scalia, and Thomas joined in the opinion of Justice Kennedy. *Id.*

⁹⁷ *Id.* at 2672.

⁹⁸ *Id.* at 2671-72.

⁹⁹ *Id.* at 2669 (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). The majority applied the standard that the Court established in *Boyde* to determine whether the jury instructions precluded the jury "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

¹⁰⁰ *Johnson*, 113 S. Ct. at 2668.

¹⁰¹ *Id.* at 2669.

¹⁰² *Id.*

¹⁰³ 492 U.S. 302 (1989).

¹⁰⁴ *Johnson*, 113 S. Ct. at 2669-70.

based on the nature of the mitigating evidence presented in each case.¹⁰⁵ In *Penry*, the jury was only able to consider the defendant's evidence of mental retardation as an aggravating factor with respect to the second special issue.¹⁰⁶ Unlike the inability to learn from previous mistakes associated with Penry's mental retardation, which can only make future dangerous acts seem more likely, the transient nature of Johnson's youth could be assessed as a mitigating factor when the jury determined the probability of Johnson's future dangerousness.¹⁰⁷ The majority cited *Graham v. Collins*¹⁰⁸ as precedent for this distinction.¹⁰⁹ While the majority acknowledged that *Graham* was a federal habeas corpus proceeding decided on the threshold *Teague* issue, it stated that the reasoning of *Graham* applied to Johnson's case on direct review.¹¹⁰

Justice Kennedy thus disagreed with Johnson's contention that "the forward-looking perspective of the future dangerousness inquiry did not allow the jury to take account of how petitioner's youth bore upon his personal culpability for the murder he committed."¹¹¹ If jurors believed that the transient quality of Johnson's youth reduced his culpability for murder, there was no reasonable likelihood that those same jurors would have felt precluded from considering Johnson's diminished culpability for the crime in evaluating his future dangerousness.¹¹²

In summary, Justice Kennedy stated that *Jurek v. Texas*¹¹³ and *Franklin v. Lynaugh*¹¹⁴ had already shown that the Texas capital sentencing statute satisfied the two competing principles required by the Eighth Amendment.¹¹⁵ If the Court accepted Johnson's argument, a trial court would have to instruct the jury to consider miti-

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2670. When an individual commits a crime at a young age, the jury can consider whether the reduced mental and emotional maturity frequently associated with youth influenced the individual's criminal behavior. *Id.* at 2669. If the jury decides that the characteristics of youth were a significant factor in the individual's behavior, then the jury may also determine that there is a low probability that the individual will be dangerous in the future because the characteristics associated with youth will diminish as the individual grows into adulthood. *Id.*

¹⁰⁸ 113 S. Ct. 892 (1993).

¹⁰⁹ *Johnson*, 113 S. Ct. at 2668 ("Graham's case differed from *Penry* in that 'Graham's evidence [of youth]—unlike Penry's—had mitigating relevance to the second special issue concerning his likely future dangerousness.'") (quoting *Graham*, 113 S. Ct. at 902).

¹¹⁰ *Id.* at 2661.

¹¹¹ *Id.* at 2670.

¹¹² *Id.*

¹¹³ 428 U.S. 262 (1976).

¹¹⁴ 487 U.S. 164 (1988).

¹¹⁵ *Johnson*, 113 S. Ct. at 2671-72.

gating evidence independently of the special issues in almost every capital case.¹¹⁶ According to Justice Kennedy, this clearly would violate the principle followed in *Jurek* and *Franklin* that a state must have the power "to structure the consideration of mitigating evidence."¹¹⁷ In addition to overruling *Jurek* and *Franklin*, a decision in favor of Johnson would impermissibly alter the reasoning in *Lockett*.¹¹⁸ Requiring a jury "to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant" contradicts the *Lockett* principle that the mitigating evidence of Johnson's youth must simply be within the effective reach of the sentencer.¹¹⁹ Since the majority was not willing to depart from precedent, the Texas special issues format remained a constitutional capital sentencing procedure.¹²⁰

B. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia agreed with the majority that the Constitution permits Texas to channel jury discretion through the special issue instructions.¹²¹ However, Justice Scalia felt compelled to indicate that there was a blatant inconsistency in the Court's capital sentencing jurisprudence. According to Justice Scalia, the principle stated in *Lockett* "that the sentencer must be allowed to consider 'all relevant mitigating evidence'" is incompatible with *Furman*'s mandate that the sentencer's discretion be channeled.¹²² Justice Scalia stated that this inconsistency "will continue to be true unless and until the sort of 'channelling' of mitigating discretion that Texas has engaged in here is not merely *permitted* (as the Court today holds), but positively *required*."¹²³ Unwilling to support such a further elaboration of the Court's intricate Eighth Amendment jurisprudence, Justice Scalia concluded by stating that the majority's decision was a proper clarification of *Franklin* and *Boyd*.¹²⁴

C. JUSTICE THOMAS' CONCURRENCE

Justice Thomas wrote a one-paragraph concurrence listing three reasons why he felt Johnson could not base a successful argu-

¹¹⁶ *Id.* at 2671.

¹¹⁷ *Id.* at 2672.

¹¹⁸ *Id.* at 2671.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2672.

¹²¹ *Id.* (Scalia, J., concurring).

¹²² *Id.* (Scalia, J., concurring).

¹²³ *Id.* (Scalia, J., concurring).

¹²⁴ *Id.* (Scalia, J., concurring).

ment on *Penry v. Lynaugh*.¹²⁵ First, Justice Thomas opined that the decision in *Penry* was wrongly decided.¹²⁶ While Justice Thomas did not present his reasoning for this conclusion, he did cite his concurring opinion in *Graham v. Collins*¹²⁷ as support for the proposition.¹²⁸ Second, he stated his belief that later opinions have narrowed the scope of *Penry*.¹²⁹ Finally, he felt that the facts of *Penry* were readily distinguishable from Johnson's case, although he did not explain the distinction.¹³⁰

D. THE DISSENTING OPINION

Writing for the dissent,¹³¹ Justice O'Connor concluded that the Texas jury instructions did not adequately protect Johnson's constitutional rights.¹³² Justice O'Connor stressed the critical relationship between Johnson's youth and his moral culpability for the crime he committed.¹³³ Although Justice O'Connor recognized that the jury was able to give *some* consideration and effect to Johnson's youth in the assessment of the "future dangerousness" special issue, she felt the jury had no choice but to impose the death sentence on Johnson without regard to any mitigating effect that Johnson's youth had on his moral culpability.¹³⁴

Interpreting *Penry*, Justice O'Connor stated that the Constitution requires that the sentencer in a capital case "be able to give *full* effect to all mitigating evidence concerning the defendant's character and record and the circumstances of the crime."¹³⁵ According to Justice O'Connor, two factors indicate that the jury was unable to give full effect to Johnson's youth.¹³⁶ First, the prosecution intro-

¹²⁵ *Id.* (Thomas, J., concurring) (discussing *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

¹²⁶ *Id.*

¹²⁷ 113 S. Ct. 892, 903 (1993) (Thomas, J., concurring).

¹²⁸ *Johnson*, 113 S. Ct. at 2672 (Thomas, J., concurring).

¹²⁹ *Id.* (Thomas, J., concurring) (citing *Graham*, 113 S. Ct. at 913-14).

¹³⁰ *Id.* (Thomas, J., concurring).

¹³¹ Justice O'Connor authored the dissenting opinion, joined by Justices Blackmun, Stevens, and Souter. *Id.* at 2672.

¹³² *Id.* at 2680 (O'Connor, J., dissenting).

¹³³ *Id.* at 2673 (O'Connor, J., dissenting).

¹³⁴ *Id.* (O'Connor, J., dissenting).

¹³⁵ *Id.* at 2675 (O'Connor, J., dissenting). Unlike the majority in *Johnson*, Justice O'Connor's interpretation of *Penry* did not focus on the finding that Penry's evidence was only relevant to the second special issue as an aggravating factor. *Johnson*, 113 S. Ct. at 2679. According to Justice O'Connor, the Court in *Penry* did not determine that the second special issue was inadequate "because the evidence worked only against Penry." *Id.* Rather, the Court decided that the second special issue "was [constitutionally] inadequate because it did not allow the jury to give full effect to Penry's mitigating evidence." *Id.*

¹³⁶ *Id.* at 2673 (O'Connor, J., dissenting).

duced sufficient evidence at trial to establish that Johnson's violent behavior was becoming more severe as Johnson grew older.¹³⁷ Given this evidence, along with the fact that the dangerousness associated with Johnson's youth would not dissipate until sometime in the future, there was a reasonable likelihood that the jury only considered Johnson's youth as an aggravating factor.¹³⁸ If this occurred, the jury would unconstitutionally have failed to give effect to the mitigating nature of Johnson's youth.¹³⁹ Second, even if the jury gave some mitigating effect to Johnson's youth while assessing the second issue, the special issues framework still prevented the jury from considering the most relevant mitigating aspect of Johnson's youth—moral culpability.¹⁴⁰ Without giving mitigating effect to the relationship between Johnson's youth and his moral culpability for the murder he committed, the jury was unable to express a "reasoned moral response" in sentencing Johnson to death.¹⁴¹

Unlike the majority, Justice O'Connor did not feel that the holding of *Jurek v. Texas*¹⁴² compelled the Court to rule against Johnson.¹⁴³ Based on the conclusion of five concurring and dissenting Justices in *Franklin v. Lynaugh*,¹⁴⁴ Justice O'Connor stated that the facial review in *Jurek* did not suggest that the Texas sentencing statute is constitutional in all circumstances.¹⁴⁵ The defendant's success in *Penry* indicated that the special issues scheme is open to individual "as applied" constitutional attacks.¹⁴⁶ Therefore, the Court should have evaluated Johnson's "as applied" constitutional challenge without regard to the holding in *Jurek*.¹⁴⁷

In addition, Justice O'Connor concluded that *Graham v. Collins*¹⁴⁸ was not controlling.¹⁴⁹ In *Graham*, the decisive issue had not

¹³⁷ *Id.* (O'Connor, J., dissenting).

¹³⁸ *Id.* (O'Connor, J., dissenting).

¹³⁹ *Id.* (O'Connor, J., dissenting).

¹⁴⁰ *Id.* (O'Connor, J., dissenting).

¹⁴¹ *Id.* at 2674 (O'Connor, J., dissenting).

¹⁴² 428 U.S. 262 (1976).

¹⁴³ *Johnson*, 113 S. Ct. at 2677-78 (O'Connor, J., dissenting).

¹⁴⁴ 487 U.S. 164 (1988).

¹⁴⁵ *Johnson*, 113 S. Ct. at 2678 (O'Connor, J., dissenting). According to Justice O'Connor, the *Johnson* majority improperly relied on the minority view of this issue in *Franklin*. In discussing the majority's interpretation of *Franklin*, Justice O'Connor stated: [The majority] goes so far as to note with approval the minority position that "*Jurek* foreclosed the defendant's argument that the jury was still entitled to cast an 'independent' vote against the death penalty even if it answered yes to the special issues." This reading of *Franklin* turns *stare decisis* on its head.

Id. (O'Connor, J., dissenting) (citing *Franklin*, 487 U.S. at 180).

¹⁴⁶ *Id.* (O'Connor, J., dissenting).

¹⁴⁷ *Id.* (O'Connor, J., dissenting).

¹⁴⁸ 113 S. Ct. 892 (1993).

been whether the constitution required an additional instruction to allow the jury to give full effect to Graham's youth; rather, *Graham* had focused on the nature of the Court's collateral review.¹⁵⁰ Following the applicable standards for collateral review, the Court initially had to determine whether Graham's contention required a new constitutional rule.¹⁵¹ Because Johnson brought his argument before the Court on direct review, the Court was not similarly constrained by this threshold issue.¹⁵² As a result, the Court had a "constitutionally imposed duty to resolve [Johnson's contention] . . . 'in light of [the Court's] best understanding of governing constitutional principles.'" ¹⁵³ Applying this reasoning, Justice O'Connor concluded that the Court should have vacated Johnson's sentence and remanded the case for resentencing.¹⁵⁴

V. ANALYSIS

The qualitative difference between capital punishment and other noncapital sentences creates a greater "need for reliability in the determination that death is the appropriate punishment in a specific case."¹⁵⁵ By upholding the constitutionality of the Texas capital sentencing statute in *Johnson v. Texas*, the Supreme Court sanctioned an intolerable degree of uncertainty in the sentencing procedure. Constrained by the limitations of the special issues framework, the Texas jury was unable to give full effect to the mitigating force of Dorsie Lee Johnson's youth as it related to his moral culpability for the crime committed. The jury's inability to focus on Johnson's moral culpability created an unnecessary risk that Johnson would be undeserving of the punishment he received. Recognizing this inherent deficiency in Texas former capital sentencing system, this Note argues that the Texas statute violated the Eighth Amendment by limiting the jury's consideration of Johnson's youth through the special issues format.

A. MORAL CULPABILITY MUST BE AT THE CENTER OF THE CAPITAL SENTENCING PROCESS

To analyze whether the Texas capital sentencing statute was

¹⁴⁹ *Johnson*, 113 S. Ct. at 2674 (O'Connor, J., dissenting).

¹⁵⁰ *Id.* (O'Connor, J., dissenting).

¹⁵¹ *Id.* (O'Connor, J., dissenting). See *supra* note 61 and accompanying text.

¹⁵² *Id.* (O'Connor, J., dissenting).

¹⁵³ *Id.* (O'Connor, J., dissenting) (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring)).

¹⁵⁴ *Id.* at 2680 (O'Connor, J., dissenting).

¹⁵⁵ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

consistent with the requirements of the Eighth Amendment, it is necessary to determine what modern society considers to be the most important factors in the capital sentencing process. For many decades, the Supreme Court has followed the principle that the scope of the Eighth Amendment's protection against "cruel and unusual punishment" must adapt to the "evolving standards of decency that mark the progress of a maturing society."¹⁵⁶ By examining state capital sentencing legislation, as well as previous Court opinions, it is possible to discover the current "standards of decency" in society and, thus, better understand the scope of the Eighth Amendment's protection.¹⁵⁷

In thirty of the thirty-six states that provide for the death penalty, the legislature has adopted a sentencing statute that enumerates certain mitigating circumstances which the sentencer must consider in making its determination.¹⁵⁸ While the states vary greatly on the type of mitigating circumstances deemed important, each of the thirty state statutes requires the sentencer to consider the moral culpability of the defendant.¹⁵⁹ Of these thirty states, four states simultaneously list the probability of future dangerousness and the defendant's moral culpability as mitigating circumstances.¹⁶⁰

One of the aforementioned thirty states, Oregon, has more directly recognized the important role that moral culpability plays in

¹⁵⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

¹⁵⁷ *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 220-26 (1976) (White, J., concurring).

¹⁵⁸ Six states have chosen not to list any mitigating factors in their sentencing statutes. These states are Delaware, Georgia, Idaho, Oklahoma, South Dakota, and Texas. Beverly Lowry, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 851 n.66 (1992).

¹⁵⁹ In almost all thirty states, the statute directly asks the sentencer to examine "whether the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was impaired." *Id.* at 848. See, e.g., ALA. CODE § 13A-5-51(6) (1982); ARIZ. REV. STAT. ANN. § 13-703.G.1 (Supp. 1993); COLO. REV. STAT. ANN. § 16-11-103(4)(b) (West Supp. 1993); CONN. GEN. STAT. § 53a-46a(g)(2) (1991); FLA. STAT. ANN. § 921-141(6)(f) (West 1985); MO. ANN. STAT. § 565.032.3(6) (Vernon Supp. 1993); MONT. CODE ANN. § 46-18-304(4) (1993); N.H. REV. STAT. ANN. § 630:5.VI(a) (Supp. 1992); N.C. GEN. STAT. § 15A-2000(f)(6) (1991); WYO. STAT. § 6-2-102(j)(vi) (Supp. 1993).

¹⁶⁰ See COLO. REV. STAT. ANN. § 16-11-103(4)(b) & (k) (West Supp. 1993); MD. ANN. CODE art. 27, § 413(g)(4) & (7) (1988); N.M. STAT. ANN. § 31-20A-6.C & G (Michie 1990); WASH. REV. CODE ANN. § 10.95.070(6) & (8) (West 1990). Unlike Texas, these states do not list "future dangerousness" in a tripartite special issue format in which the sentencer must give a direct answer to the question of future dangerousness. Rather, the four state statutes include future dangerousness among a multitude of mitigating factors that the jury must consider in making the final sentencing determination.

the capital sentencing determination by channeling the sentencer's consideration of enumerated mitigating circumstances within a special issues framework.¹⁶¹ While Oregon's statute instructs the sentencer to answer the same three special issues as the Texas statute, the Oregon statute adds a fourth question that requires the sentencer to consider directly "whether the defendant should receive a death sentence."¹⁶² This "catch all" provision allows the jury to refuse to impose the death penalty for any reason, including a lack of moral culpability on the part of the defendant. Much like the enumeration of moral culpability as a mitigating circumstance in the aforementioned thirty states, this fourth question indicates that society's "evolving standards of decency" demand a strong consideration of a defendant's moral culpability.

Even the Texas legislature has recognized that society places a great deal of emphasis on the relationship between punishment and a defendant's moral culpability.¹⁶³ By adding a fourth question similar to that in the Oregon statute to the Texas sentencing statute at issue in *Johnson v. Texas*,¹⁶⁴ the legislature guaranteed that, henceforth, a sentencer would be able to consider a defendant's moral culpability before imposing the ultimate penalty of death.¹⁶⁵

The Supreme Court, like the state legislatures, has recognized that moral culpability plays a crucial role in the capital sentencing procedure. In *Penry v. Lynaugh*,¹⁶⁶ the Court announced, on two separate occasions, that "punishment should be directly related to the personal culpability of the [criminal] defendant."¹⁶⁷ Likewise, the Court in *Booth v. Maryland*¹⁶⁸ concluded that capital sentencing must be based on the "personal responsibility and moral guilt" of the defendant.¹⁶⁹

As indicated by recent statements of state legislatures and the

¹⁶¹ OR. REV. STAT. § 163.150 (1991).

¹⁶² *Id.* § 163.150(1)(b)(D).

¹⁶³ *See supra* note 66.

¹⁶⁴ 113 S. Ct. 2658 (1993).

¹⁶⁵ *See supra* note 66.

¹⁶⁶ 492 U.S. 302 (1989).

¹⁶⁷ *Id.* at 319, 327.

¹⁶⁸ 482 U.S. 496 (1987).

¹⁶⁹ *Id.* at 502. *See also* Skipper v. South Carolina, 476 U.S. 1, 11-12 (1986) (Powell, J., concurring) ("[A]s long as [statutes] do not foreclose consideration of factors that may tend to reduce the defendant's culpability for his crime, this Court should respect them. . . . [The] focus [should be] on evidence that lessens the defendant's culpability for the crime for which he was convicted."); Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) ("In my view, the principle underlying *Lockett*, *Edwards*, and *Hitchcock* is that punishment should be directly related to the personal culpability of the criminal defendant.").

Supreme Court, society clearly views moral culpability as an important factor in the capital sentencing process.¹⁷⁰ Given this societal consensus, it is difficult to avoid the conclusion that the Texas sentencing statute in force at the time Johnson was sentenced to death violated the requirements of the Eighth Amendment.

B. WHILE APPLYING THE CONFLICTING PRINCIPLES OF *FURMAN* AND *LOCKETT*, THE MAJORITY LOST SIGHT OF THE IMPORTANCE OF MORAL CULPABILITY IN THE CAPITAL SENTENCING PROCESS

The majority followed two well-established principles of Eighth Amendment analysis. The first principle, established in *Furman*, requires states to channel the discretion of sentencing juries through appropriate statutory schemes.¹⁷¹ The second principle, in tension with the first, states that "[a] sentencer [must] . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."¹⁷² Although the majority was correct in identifying these principles as essential in assessing the constitutionality of the Texas capital sentencing statute, the manner in which the Court applied them ignored the most important aspect of Johnson's mitigating evidence—its relationship to his moral culpability.

The weakness in the majority's reasoning stems primarily from its application of the second principle. In regard to this principle, the majority stated that "there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of [Johnson's] youth."¹⁷³ The majority's conclusion rested on the assumption that "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient."¹⁷⁴ While youth certainly is transient, the majority wrongly assumed that transience is the primary mitigating quality of youth.

The majority essentially ignored the emotional and mental immaturity that frequently accompanies youth.¹⁷⁵ The Court has re-

¹⁷⁰ See *supra* notes 157-69 and accompanying text.

¹⁷¹ *Furman v. Georgia*, 408 U.S. 238 (1972). See *supra* note 8 and accompanying text.

¹⁷² *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

¹⁷³ *Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993). The majority determined that "there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination." *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ The majority did acknowledge that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more under-

peatedly recognized that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."¹⁷⁶ Deriving from the adolescent's lack of the "experience, perspective, and judgment expected of adults," this vulnerability frequently makes the adolescent less morally culpable than an adult for the same criminal act.¹⁷⁷ The law must reflect this important aspect of youth by reducing the level of punishment in relation to the degree to which the defendant's immaturity influenced his criminal act.¹⁷⁸

While the majority correctly concluded that the special issues framework did not preclude the jury from considering a relevant mitigating aspect of youth—specifically the possibility that Johnson would become less dangerous as he grew older—the majority failed to recognize that the same special issues placed the most relevant mitigating effect of youth beyond the jury's reach. Despite the jury's inability to impose a sentence with a severity *directly* proportional to the defendant's moral culpability, the majority upheld the Texas statute.¹⁷⁹ According to the Court, the statute's failing did not rise to the level of a constitutional violation because the jury could have indirectly considered the effect of Johnson's youth on his moral culpability when answering the second special issue.¹⁸⁰ It seems illogical, however, to say that the Eighth Amendment requires only an

standable among the young." *Id.* at 2668-69. However, after making this statement, the majority limited its significance by confining the jury's inquiry to the transient nature of immaturity and impetuosity. *Id.* at 2669. Thus, the majority gave no substantive significance to Johnson's maturity level and its relationship with culpability, but rather referred to this aspect of youth merely as a tool to support the already obvious proposition that youth is transient.

¹⁷⁶ See *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

¹⁷⁷ *Eddings*, 455 U.S. at 116; *Thompson*, 487 U.S. at 835.

¹⁷⁸ *Eddings*, 455 U.S. at 116 ("Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.").

¹⁷⁹ Constrained within the parameters of the inquiry of "future dangerousness," the jury was unable to directly consider the effect of youth on Johnson's moral culpability. Without directly considering that relationship, any final sentencing determination logically cannot be directly related to the amount of punishment that Johnson deserved. Rather, the severity of the sentence will have a less precise, attenuated relationship with moral culpability. As the Court has indicated, this is unacceptable. *Penry v. Lynaugh*, 492 U.S. 302, 319, 327-28 (1989) ("[P]unishment should be directly related to the personal culpability of the [criminal] defendant.").

¹⁸⁰ *Johnson v. Texas*, 113 S. Ct. 2658, 2670 (1993). The majority stated that "[i]f any jurors believed that the transient qualities of petitioner's youth made him less culpable for the murder, there is no reasonable likelihood that those jurors would have deemed themselves foreclosed from considering that in evaluating petitioner's future dangerousness." *Id.*

indirect consideration of the element that society has deemed to be most important to the capital sentencing determination.¹⁸¹

Although the jury may not have found Johnson's youth—he was nineteen years of age at the time he committed the crime—to be a significant mitigating factor in relation to Johnson's moral culpability, the Constitution requires that the jury at least have the opportunity to directly make such a determination.¹⁸² At some age, whether it be sixteen years of age or fourteen years of age, the emotional and mental immaturity associated with youth will have a pronounced mitigating effect on a defendant's moral culpability.¹⁸³ Because this mitigating effect likely holds an inverse relationship to a defendant's age, the flaw in the majority's reasoning would become even more apparant if a defendant younger than Johnson were subject to Texas' capital sentencing procedure. It would be interesting to see whether the majority would have upheld the constitutionality of the special issues if Johnson had been only fourteen years of age at the time he committed the crime. At this younger age, the relationship between youth and the defendant's "future dangerousness" becomes much more speculative, thus enhancing the danger that the jury will not impose a sentence directly proportional to the fourteen-year-old defendant's moral culpability.

In summary, in applying the competing principles announced in *Furman* and *Lockett* to the facts of Johnson's case, the majority did not give sufficient weight to the evolving policy behind those principles.¹⁸⁴ As state legislation and prior Court opinions indicate, the majority should have been guided by the current consensus that moral culpability must play a central role in the death sentencing analysis. Since the jury was not allowed to consider Johnson's unique circumstances as they reflected upon his moral culpability, his sentence should have been vacated by the Court. Although the recent amendment of Texas' sentencing statute limits the immediate impact of the Court's decision on future defendants,¹⁸⁵ the Court's

¹⁸¹ See *supra* part V.A.

¹⁸² See *supra* notes 166-69 and accompanying text.

¹⁸³ See *supra* notes 176-78 and accompanying text.

¹⁸⁴ See *supra* notes 156-69 and accompanying text. Since the scope of the Eighth Amendment adapts to societal consensus, the principles underlying the Eighth Amendment's protection must also fluctuate with societal consensus.

¹⁸⁵ Any defendants who committed a capital murder in Texas after September 1, 1991 will be subject to the provisions of the amended sentencing statute. TEX. CRIM. PROC. CODE ANN. § 37.071(2)(e) (West Supp. 1994). Because a jury has the ability under the amended version of the statute to fully consider a defendant's proffered mitigating evidence as it affects his moral culpability for the crime committed, the Court's principles would not control the outcome of those defendants' appeals. *Id.* There may still be convicted defendants on death row that are subject to the provisions of the Texas sen-

reasoning may significantly influence the Texas legislature's perception of the capital sentencing process. By establishing precedent counter to the prevailing societal consensus, the Court created a temptation for the Texas legislature to abandon the recent amendment of the capital sentencing statute.¹⁸⁶ Supported by the views of the Court, the legislature may feel more confident about de-emphasizing the importance of moral culpability within a more stringent capital sentencing statute.¹⁸⁷

C. THE COURT SHOULD NOT SANCTION A SENTENCING STATUTE THAT IS INCONSISTENT WITH SOCIETAL CONSENSUS WHEN PAST PRECEDENT DOES NOT COMPEL THE COURT TO DO SO

Considered individually, none of the Texas special issues provided an effective medium for the jury to properly consider the relationship between Johnson's youth and his moral culpability for the crime he committed.¹⁸⁸ Despite this deficiency, the majority felt

tencing statute under attack in *Johnson v. Texas*, 113 S. Ct. 2658 (1993). For these defendants, the Court's decision substantially diminishes the chance of succeeding on an appeal based on a jury's inability to fully consider the defendant's unique circumstances through the special issues inquiry.

¹⁸⁶ Currently, there are three capital punishment-related bills pending in the Texas legislature that may be indirectly affected by the Court's principles. See H.B. 2735, 73rd Leg., Reg. Sess. (1993) (proposes to exclude defendants suffering from mental retardation or mental illness from the penalty of capital punishment); H.B. 727, 73rd Leg., Reg. Sess. (1993) (proposes to make certain murders committed by individuals incarcerated in penal institutions a capital offense punishable by death); H.B. 427, 73rd Leg., Reg. Sess. (1993) (involves the punishment of attempted capital murder).

¹⁸⁷ By reducing the risk of Eighth Amendment attack, the Court's decision created a similar temptation for other states with pending capital punishment legislation to diminish the role of moral culpability within the capital sentencing process. See, e.g., Nebraska L.B. 1351, 93rd Leg., 2d Sess. (1994) (changes provisions relating to sentencing and appeals in capital punishment cases); Alaska H.B. 162, 18th Leg., 2d Sess. (1993) (authorizes capital punishment and establishes sentencing procedures for capital felonies); Massachusetts H.B. 677, 179th Gen. Court, Reg. Sess. (1994) (provides for capital punishment for certain persons convicted of first degree murder); Ohio S.B. 107, 120th Leg., Reg. Sess. (1993) (establishes a new capital punishment aggravating circumstance when murder is committed during the commission of a felonious assault by gross abuse); Michigan S. J. Res. 6, 87th Leg., Reg. Sess. (1993) (establishes capital punishment for first degree murder); Mississippi H.B. 1479, 162nd Leg., Reg. Sess. (1994) (allows trial judge to determine punishment in capital cases).

¹⁸⁸ *Johnson v. Texas*, 113 S. Ct. 2658, 2673 (1993) (O'Connor, J., dissenting). Part B of this analysis indicated that the second special issue of "future dangerousness" was inadequate for this purpose. The first and third special issues were equally ineffective. For the first special issue, the jury determined that Johnson "deliberately" committed the murder of the convenience store clerk. *Id.* at 2664. While at first glance it may appear that a question dealing with Johnson's intent allowed the jury to address Johnson's moral culpability, the question was merely a restatement of the jury's determination in the conviction stage of the trial that Johnson intended to kill the store clerk. Constrained by the redundant scope of the first special issue, there was no opportunity for the jury to consider the relationship between Johnson's youth and his moral culpabil-

compelled by former precedent, primarily through a reliance on *Jurek v. Texas*,¹⁸⁹ to reaffirm the constitutionality of the Texas capital sentencing statute.¹⁹⁰ This strong conviction to adhere to past precedent caused the majority actually to distort the Eighth Amendment principles developed by the Court over the past decade.

As the Court recognized in *Lockett v. Ohio*,¹⁹¹ the Eighth Amendment demands that sentencing statutes reflect the "respect due the uniqueness of the individual."¹⁹² Following this policy, the Court developed one of the most fundamental principles in Eighth Amendment analysis: a sentencer must not be precluded from "giving *independent* mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation."¹⁹³ Although the majority purported to apply this principle in evaluating the constitutionality of the Texas sentencing statute, it failed to give any significance to the most important term in the principle—the word "independent."¹⁹⁴ Eliminating the word "independent" from the stated principle, the majority concluded that "'*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence.'"¹⁹⁵

The importance of the word "independent" stems from the Court's desire to eliminate any statutory constraints that channel the sentencer's attention away from the most relevant mitigating aspects of an individual defendant and his crime.¹⁹⁶ Under the Texas special issue framework, any weight the jury gave to Johnson's youth

ity. Similarly, the third special issue did not provide a medium through which the jury could give any weight to the all-important issue of Johnson's moral culpability because the third special issue was not raised by the facts of *Johnson*. *Id.* at 2662 n.2.

¹⁸⁹ 428 U.S. 262 (1976).

¹⁹⁰ *Johnson*, 113 S. Ct. at 2671-72.

¹⁹¹ 438 U.S. 586 (1978).

¹⁹² *Id.* at 605.

¹⁹³ *Id.* (emphasis added).

¹⁹⁴ The majority simply stated that the principle of *Lockett* required "that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Johnson*, 113 S. Ct. at 2665 (quoting *Lockett*, 438 U.S. at 604). The majority completely ignored that the Court in *Lockett* further defined the scope of the term "considering" to mean "giving *independent* mitigating weight to aspects of [a] defendant's character." *Lockett*, 438 U.S. at 605 (emphasis added). In light of the Court's concern about not altering *Lockett*, it is ironic that the majority actually did alter *Lockett* by eliminating the importance of the phrase "independent mitigating weight." See *Johnson*, 113 S. Ct. at 2671.

¹⁹⁵ *Johnson*, 113 S. Ct. at 2666 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring)).

¹⁹⁶ By giving "independent mitigating weight" to evidence, the sentencer can consider any aspect of the evidence that may call for a less severe penalty. Thus, the sen-

was entirely *dependent* on its relationship with the probability of Johnson's "future dangerousness." This type of restricted consideration of mitigating evidence created the very danger that the Court in *Lockett* was trying to avoid. Without being able to give evidence "independent mitigating weight," it was unlikely that the jury would be able to impose the appropriate level of punishment in relation to Johnson's "unique" circumstances.¹⁹⁷ This unnecessary risk deprived Johnson of the full protection of the Eighth Amendment.

In addition to the majority's failure to recognize the importance of the term "independent," the majority also relied too heavily on *Jurek v. Texas*.¹⁹⁸ Although the Court in *Lockett* did not overrule *Jurek*'s conclusion that the Texas sentencing statute was constitutional on its face, neither did the Court suggest that the statute would always meet the requirements of the Eighth Amendment. The Court explicitly stated *at the time* it decided *Jurek*, that the statute allowed the sentencer in that case to consider any aspect of the defendant's proffered evidence "as an independently mitigating factor."¹⁹⁹ Consistent with this determination, the Court in *Penry v. Lynaugh*²⁰⁰ concluded that under certain fact patterns, the Texas sentencing statute precluded the jury from giving independent mitigating weight to a defendant's proffered evidence.²⁰¹ While *Penry* also did not overrule *Jurek*, the Court's decision opened the door to future "as applied" constitutional attacks on the Texas statute.²⁰² Because Johnson's argument closely followed the "as applied" principles established in *Penry*, the majority should not have afforded any weight to the conclusion in *Jurek* that the Texas statute was facially constitutional.

In light of *Penry*, it is evident that the majority erred in concluding that the Eighth Amendment simply requires the sentencer to be able to consider in *some* manner all of a defendant's relevant mitigating evidence.²⁰³ According to the Court in *Penry*, a statute that does

tencer can consider and give effect to the critical relationship between Johnson's youth and his moral culpability for the crime he committed.

¹⁹⁷ See *Lockett*, 438 U.S. at 605. Specifically, the jury was unable to impose a punishment in proportion with Johnson's "unique" moral culpability for the crime he committed.

¹⁹⁸ 428 U.S. 262 (1976).

¹⁹⁹ *Lockett*, 438 U.S. at 607 ("None of the statutes we sustained in *Gregg* and the companion cases [*Jurek v. Texas*] clearly operated *at that time* to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.").

²⁰⁰ 492 U.S. 302 (1989).

²⁰¹ *Id.* at 320-22.

²⁰² See *id.*

²⁰³ *Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993) ("As long as the mitigating evi-

not allow the jury to consider *fully* and give effect to the defendant's mitigating evidence is clearly unconstitutional.²⁰⁴ Without fully considering the evidence, a sentencer would not be capable of making a "reasoned moral response" about the appropriate level of punishment to impose.²⁰⁵ Only a system that allows the jury to make a "reasoned moral response" to mitigating evidence will satisfy the constitutional requirement that punishment "be directly related to the moral culpability of the defendant."²⁰⁶ The majority's attempt to differentiate Johnson's case from *Penry* did not focus on this critical connection between the *full* consideration of evidence and a "reasoned moral response."²⁰⁷ Like *Penry*'s evidence of mental retardation, Johnson's youth had mitigating value that went well beyond the special issue of "future dangerousness." The proper inquiry under the Eighth Amendment should have been whether the jury could fully consider Johnson's youth as it affected his moral culpability.²⁰⁸ Clearly, the special issues did not allow the jury to make such a consideration and, thus, failed to ensure that Johnson's punishment was "directly related" to his moral culpability.²⁰⁹

Just as the majority misapplied *Penry*, the majority improperly invoked the doctrine of stare decisis by relying on *Graham v. Collins*²¹⁰ for precedential support.²¹¹ Although the defendant in *Graham* claimed, similar to Johnson, that the Texas special issues did

dence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied.") (quoting *Graham v. Collins*, 113 S. Ct. 892, 901 (1993)).

²⁰⁴ In *Penry*, the Court stated on two separate occasions that a sentencing statute must allow *full* consideration of mitigating evidence. First, while interpreting *Franklin v. Lynaugh*, 487 U.S. 164 (1988), the majority stated "both the concurrence and the dissent [in *Franklin*] understood *Jurek* as resting fundamentally on the express assurance that the special issues would permit the jury to *fully* consider all the mitigating evidence a defendant introduced that was relevant to the defendant's background and character and to the circumstances of the offense." *Penry*, 492 U.S. at 321 (emphasis added). Second, the majority concluded that, "[r]ather than creating the risk of an unguided emotional response, *full* consideration of evidence that mitigates against the death penalty is essential." *Id.* at 328 (emphasis added).

²⁰⁵ *Penry*, 492 U.S. at 328.

²⁰⁶ *Id.* at 327.

²⁰⁷ *Johnson*, 113 S. Ct. at 2669-70. The Court stated that "the only logical manner in which the evidence of [Penry's] mental retardation could be considered within the future dangerousness inquiry was as an aggravating factor." *Id.* In contrast, the Court concluded that "the ill effects of youth that [Johnson] may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue." *Id.* at 2670.

²⁰⁸ See *supra* notes 204-06 and accompanying text.

²⁰⁹ See *supra* notes 166-69 and accompanying text.

²¹⁰ 113 S. Ct. 892 (1993).

²¹¹ *Johnson*, 113 S. Ct. at 2674.

not allow the jury to give adequate mitigating effect to evidence of his youth,²¹² the Court's ruling against *Graham*²¹³ should not have affected the success of Johnson's claim. As Justice O'Connor indicated in her dissenting opinion, the Court in *Graham* did not deal directly with the issue of "whether an additional instruction to allow the jury to give full effect to Graham's youth was constitutionally mandated."²¹⁴ Because *Graham* was before the Court on a petition for a writ of habeas corpus, the Court based its conclusion on the threshold issue of whether the defendant's allegation would require a new constitutional rule.

In contrast to *Graham*, Johnson brought his claim to the Court on direct review.²¹⁵ Although the majority recognized that it was not necessary for the Court to determine whether Johnson was asking for a new constitutional rule, the majority still applied the analysis of *Graham* to Johnson's case.²¹⁶ By using the reasoning of *Graham* as precedent, the Court indirectly subjected Johnson to the higher standards of collateral review.²¹⁷ Given the severity of Johnson's sentence, the majority should have evaluated Johnson's argument solely on the basis of constitutional merit.²¹⁸ The majority's reliance on *Graham*, a case decided on a threshold issue irrelevant to Johnson's claim, jeopardized this goal.

VI. CONCLUSION

In *Johnson v. Texas*, the Court concluded that the former Texas capital sentencing statute did not violate the Eighth Amendment rights of petitioner Dorsie Lee Johnson, Jr. Although the statute's special issue framework may have prevented the jury from fully con-

²¹² *Graham*, 113 S. Ct. at 895.

²¹³ *Id.* at 903.

²¹⁴ *Johnson*, 113 S. Ct. at 2674 (O'Connor, J., dissenting). Justice O'Connor's statement reflects the Court's conclusion in *Graham* that "even if *Penry* reasonably could be read to suggest that Graham's mitigating evidence was not adequately considered under the former Texas procedures, that is not the relevant inquiry under *Teague*." *Graham*, 113 S. Ct. at 902-03.

²¹⁵ *Johnson*, 113 S. Ct. at 2668.

²¹⁶ *Id.* at 2668-69.

²¹⁷ *Id.* The principles established in *Graham* all revolved around the central issue of whether Graham's requested relief was a new constitutional rule. The Court applied a "reasonable jurists" standard to resolve this issue. Under this standard, the Court had to rule against Graham "unless reasonable jurists hearing [his] claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor." *Graham*, 113 S. Ct. at 898 (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)). When this standard is no longer relevant in a case on direct review, the conditional relationship between *Graham*'s principles and the standard breaks down, thus eroding the precedential value of the principles.

²¹⁸ *Johnson*, 113 S. Ct. at 2674 (O'Connor, J., dissenting).

sidering the mitigating relationship between Johnson's youth and his moral culpability for the crime committed, the Court determined that the Eighth Amendment merely required the mitigating evidence to be "within the effective reach of the sentencer."²¹⁹ Because the jury could adequately consider the transient quality of Johnson's youth in its determination of Johnson's "future dangerousness," the constitution did not require an additional jury instruction to inform the jury that it should directly consider the effect of Johnson's youth on his moral culpability.

Similar to *Penry v. Lynaugh*,²²⁰ the Court should have ruled that the Texas capital sentencing statute violated Johnson's Eighth Amendment rights because the statute created a "risk that the death penalty [would] be imposed in spite of factors which may [have] call[ed] for a less severe penalty."²²¹ Clearly, youth has mitigating relevance to a defendant's moral culpability for the crime committed. By forcing the jury to take account of this critical relationship while answering the "future dangerousness" special issue, the statute confined the jury to an indirect consideration of the most relevant mitigating aspect of Johnson's youth—his moral culpability. As a result of this deficiency, there was a grave danger that the Texas system would impose a punishment that was not directly proportional to Johnson's moral culpability. As in *Penry*, the Court should have decided that a system which perpetuated this possibility was "cruel and unusual punishment" under the Eighth Amendment.

J. MICHAEL BROWN

²¹⁹ *Id.* at 2669.

²²⁰ 492 U.S. 302 (1989).

²²¹ *Id.* at 328 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).